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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,
Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The petitioner, Browndale International Limited, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court entered in this proceeding on June 18, 1973.

OPINIONS

The opinion of the Supreme Court of Wisconsin (R. 184, App. 1)[1] is officially reported at 60 Wis. 2d 182 and is unofficially reported at 208 N.W. 2d 121.

The opinion of the Wisconsin Circuit Court (R. 101, App. 26) is not reported.

The memorandum decision of the Dane County Board of Adjustment (R. 126, App. 48) is not reported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on June 18, 1973. A timely motion for rehearing was denied on September 10, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

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[1] References to "R. —" are to the certified record. References to "App. —" are to the separate Appendix to this petition. References to "Ex. —" are to exhibits filed with the Circuit Court, which are part of the record in the Court below and in this Court.

QUESTION PRESENTED

Is it constitutional to exclude privately operated homes for up to five emotionally disturbed children from a single family dwelling zone district on the ground that such homes do not constitute traditional-biological-marriage family groups.

CONSTITUTIONAL PROVISIONS STATUTE AND ORDINANCES INVOLVED

The constitutional provisions, statute, and ordinances involved are the Due Process and Equal Protection Clauses of the United States Constitution; §59.97(1), Wisconsin Statutes; and §10.01(18)(a), §10.01(19), §10.02(1), §10.12(1)(a), §10.12(2)(c), and §10.25(4)(a) and (c), Dane County Ordinance.

DUE PROCESS AND EQUAL PROTECTION CLAUSE, U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 59.97(1), WIS. STAT. (1971)

> 59.97 Planning and zoning authority. (1) PURPOSE. It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to insure adequate highway, utility, health, educational and recreational facilities; to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds. To accomplish this purpose the county board of any county may plan for the physical development and zoning of territory within the county

as set forth in this section and shall incorporate therein the master plan adopted pursuant to s. 62.23(2) or (3) and the official map adopted pursuant to s. 62.23(6) of any city or village therein.

§10.01(18)(a) and (19), DANE COUNTY ORDINANCE (1971)

10.01 DEFINITIONS. For the purposes of this ordinance, certain terms used herein are defined as follows:

. . .

(18) Dwelling:

(a) Single Family Dwelling: A building designed for and occupied exclusively as a residence for one family.

. . .

(19) Family: Any number of individuals related by blood or marriage, or not to exceed five (5) persons not so related living together on the premises as a single housekeeping unit, including any domestic servants.

§10.02(1), DANE COUNTY ORDINANCE (1971)

10.02 DISTRICTS

(1) Creation: For the purpose of promoting the public health, safety and general welfare, by regulating, restricting and determining the location of trades and industries and the location, height, bulk and number of stories, the size of buildings and other structures, and percentage of lot which may be occupied, the size of yards and other open spaces, the density of population, the location of buildings designed for specific purposes, and of establishing districts of such number, shape and area as are best suited to carry out the purposes of Section 59.97, Wisconsin Statutes, Dane County, outside the limits of incorporated villages and cities, is hereby divided into districts as follows:

(a) R-1 Residence District
(b) R-2 Residence District
(c) R-3 Residence District
(d) R-3A Residence District
(e) R-4 Residence District
(f) RH-1 Residence District
(g) RE-1 Recreational District
(h) B-1 Local Business District
(i) A-1 Agricultural District
(j) C-1 Commercial and Light Manufacturing District
(k) C-2 Commercial and Light Manufacturing District
(l) M-1 Industrial District
(m) CO-1 Conservancy District

§10.12(1)(a), DANE COUNTY ORDINANCE (1971)

10.12 A-1 AGRICULTURAL DISTRICT

(1) PERMITTED USES

(a) Single family detached dwelling units.

. . .

§10.12(2)(c), DANE COUNTY ORDINANCE (1971)

10.12 A-1 AGRICULTURE DISTRICT

. . .

(2) PERMITTED USES WHICH ARE SUBJECT TO PROVISIONS OF 10.25 (4) APPLICATION FOR APPROVAL OF SITE

. . .

(c) Hospitals, nursing homes, convalescent homes, extended care facilities, sanitariums and orphanages provided such buildings shall be located not less than 50 feet from any lot in a residence district.

§10.25(4)(a) and (g), DANE COUNTY ORDINANCE (1971)

10.25 ADMINISTRATION, ENFORCEMENT AND PENALTIES

. . .

(4) APPLICATION FOR APPROVAL OF SITE

(a) *Purpose*: The development and excution (sic) of this ordinance is based on the division of the County into districts within which districts the use regulations are substantially uniform. It is recognized, however, that there are certain uses which, because of their unique or varying characteristics, are not permitted in any particular district without consideration, in each case, of the impact of those uses upon neighboring land and of the public need for the particular use at the particular location.

. . .

(g) *Standards*: The committee shall approve or recommend approval to the Dane County Board of Supervisors if it shall find:

(1) That the establishment, maintenance, or operation of the proposed use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare, when considered in relationship to the site.

(2) That the proposed use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially diminish and impair property value within the area,

(3) That the establishment of such use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district,

(4) That adequate utilities, access roads, drainage and necessary facilities have been provided,

(5) That adequate measures have been taken to provide ingress and egress so designed to minimize traffic congestion in the public streets, and

(6) That the proposed use conforms to the applicable regulations of the district in which it is located.

STATEMENT OF THE CASE

Respondent, Board of Adjustment, decided that petitioner's homes did not fall within the meaning of a "single family dwelling" as defined in the Dane County Zoning Ordinance. (R. 126, App. —). The Board determined that the use contemplated by Browndale required "site approval" under Section 10.12(2)(c) of the Ordinance. In essentially a trial *de novo* before Judge George R. Currie,[2] the Wisconsin Circuit Court reversed the Board's decision and held that such homes are single family dwellings if not more than five children reside therein; and if more than five children reside in such home, then site approval is required under the Ordinance. (R. 122, App. 47). The Supreme Court of Wisconsin reversed the Circuit Court and reinstated the Board of Adjustment's decision and stated that its mandate did not violate the Equal Protection Clause of the Constitution (R. 184, App. 1).

On May 15, 1973, the Circuit Court announced its decision. The facts, as principally found by the Circuit Court, are as follows:

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[2]Judge Currie is the former Chief Justice of the Supreme Court of Wisconsin, sitting as Reserve Circuit Judge.

Petitioner, Browndale International Limited, is a Canadian corporation founded by its President, John Brown. Brown is a psychiatric social worker by profession and has worked with socially disturbed children since 1944. In 1966, Brown started the privately operated Browndale program, commencing in Ontario and then branching out into the United States. There are now fifty Browndale homes being operated in the United States and Canada. (R. 102, App. 28).

The guiding principle of the Browndale program is to duplicate for the emotionally disturbed child as nearly as possible in the Browndale home what a child would get if living with his own family. (R. 102, App. 28). The Browndale model is comprised of a family home situated in the community, consisting of a man and a woman who function as surrogate parents and a small group of children living together as a family. Meals are prepared and served as they would be in any private family. (R. 102, App. 28).

There was testimony that children in Browndale homes may attend the community's public school system. The children however, do not attend such public schools if Browndale determines that a child cannot succeed there. Browndale children may join the YMCA or YWCA as individuals and, in some instances, a Browndale home will take out a family membership in such an organization. Children take music lessons, join the Boy Scouts, etc., only if it is determined that they can successfully participate in such activities. (R. 167.)

Each Browndale home is housed in a private dwelling, the exterior of which is no different than other private homes in the neighborhood. No signs are erected on the premises or affixed to the home to indicate that it is a home for emotionally disturbed children. (R. 103, App. 29).

Browndale, through its subsidiary, Involvement Centers, Wisconsin, Inc.,[3] (hereinafter "Involvement Center") operates six[4] homes in Dane County. Each home is staffed by an employee who does cooking and housework and a lady who comes in and stays with the children at night. No staff member sleeps on the premises, only the children. In addition, Involvement Center has nurses and social workers in its employ who visit the homes and has contracted with a psychiatrist and a pediatrician to supply services as needed for an hourly charge. (R. 102, App. 29).

All children in Dane County Browndale homes are placed there are a result of juvenile court proceedings. Their maintenance of $37.00 per day is either paid by the State or by the county. (R. 103, App. 29). The six homes are inadequate to meet the referrals from the State of Wisconsin. Children are in a Browndale home voluntarily and they are transferred elsewhere when they express a desire to leave.[5] (R. 104, App. 29).

Browndale homes are operated in Wisconsin under the auspices of the Department of Health and Social Services, Division of Family Services (hereinafter "Department"). (R. 104, App. 30). Initially, Browndale homes were licensed as "foster homes" by the Department. Subsequently, Involvement Center was licensed as a "child welfare agency" by the Department.[6]

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[3]Typically Browndale purchases a home and then leases it to its subsidiary, Involvement Center, which directly supervises the operation of the home.

[4]The number of homes operated are as of the commencement of this action.

[5]The average period a child stays in a Browndale home is two years (R. 104, App. 29).

[6]For a full description of how the homes are licensed, *see* (R. 104-106, App. 30-32).

On December 8, 1971, and January 22, 1972, petitioner's written offers to purchase six parcels of land, each having on it a private family dwelling house, in the Town of Cottage Grove were accepted. (R. 107, Ex. 7 and 8). Each offer contained the following material condition:

> . . . approval from municipality, county or state, whichever governmental agency has jurisdiction for purchaser's special use of this property under proper zoning. (R. 107, App. 33).

The "special use" referred to in the last stated condition is the operation of Browndale homes by Involvement Center.

One of the homes covered by the offers had been previously leased directly to Involvement Center by the owner. (R. 107, App. 33). It was petitioner's intention, after purchasing the property, to lease all six homes covered by these offers to Involvement Center for the same purpose if the zoning condition in the offers were removed.

In January, 1972, petitioner and Involvement Center consulted with Lavern J. Enger, Dane County Zoning Supervisor, regarding what, if anything, had to be done under the Ordinance in order to operate Browndale homes under the contracts of purchase in the Town of Cottage Grove. (R. 180). Enger ruled that inasmuch as foster homes had been permitted under the single family dwelling use in residential districts, and Browndale homes had previously been licensed to operate as foster homes by the Department, it made no difference that these homes were now licensed as a child welfare agency because neither foster homes nor child welfare institutions were specifically covered by the Ordinance. Therefore, it was

Enger's ruling that no affirmative steps need be taken under the Ordinance in order for the proposed Browndale homes to be operated in the A-1 Agricultural District in the Town of Cottage Grove. (R. 108-109, App. 34).

The Town of Cottage Grove appealed Enger's ruling to the Dane County Board of Adjustment. A public hearing was held before the Board on March 10, 1972. On March 17, 1972, the Board decided that: (1) Browndale homes treat emotionally disturbed children; (2) Browndale homes do not qualify as a "single family dwelling" as that term is defined by Sec. 10.01 (18) and (19) of the Ordinance since it was "not the intent of the definition of a single family dwelling to include treatment of unrelated emotionally disturbed children by unrelated persons"; (3) Such homes are of a type of use that falls within the category of institutions listed in Sec. 10.12 (2) (c) of the Ordinance and, therefore, require site approval; and (4) Petitioner was ordered to desist from operating such homes in the Town of Cottage Grove until site approval had been obtained from the Dane County Zoning Committee.[7] (R. 126, App. 48).

From these facts, the Circuit Court reversed the decision of the Board by judgment entered May 15, 1972, in a proceeding of review by certiorari. The Circuit Court held that Browndale homes in which not more than five emotionally disturbed children reside qualified as a single family dwelling under the Ordinance and required no site approval to operate in Dane County. If more than five such children resided in said homes, then site approval was required. (R. 118, App. 43).

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[7] As noted, Involvement Center was operating a home in the Town of Cottage Grove on a lease arrangement from the owner. *See* p. — *supra*.

In making this determination, Circuit Judge Currie recognized that a different holding would render the Zoning Ordinance unconstitutional (R. 117, App. 42):

> The welfare of emotionally disturbed children living in Browndale homes requires that such homes be located where other private families reside, and not be confined to a district zoned as a commercial or industrial district. A zoning ordinance which does not permit such houses to be located in any district where families usually reside would in the Court's opinion be unconstitutional. A State interest is involved because the Division of Family Services places children in these homes, and a zoning Ordinance which excludes them from all residential districts would be unconstitutional. ***Abbott House v. Terrytown*** (1970), 34 App. Div. 2d 281, 312 N.Y.S. 2d 841.

In considering the change in licensing by the State from "foster home" to "child welfare agency" as it affected zoning determinations, the Circuit Court stated (R. 114, App. 39):

> While dealing with this matter of licensing as a child welfare institution it must be kept in mind that *the nature of the operation of the Browndale homes in Dane County did not change one iota* from what it was when they were licensed as foster homes with respect to any aspect which would affect zoning. As Miss Neupert testified, their operation does not have the characteristics of what one ordinarily associates with institutional care of children. Furthermore, it is conceded that foster homes, in which not more than five unrelated persons reside, qualify as single family dwellings under the ordinance. It would clearly be a denial of equal protection of the laws under the Fourteenth Amendmend to so interpret and administer the ordinance as to permit foster homes having no more than five unrelated persons residing therein in residential and agricultural districts without the necessity of site approval, and require site approval for a Browndale home having no more than five unrelated children and no adults residing therein. [Emphasis added.]

The decision of the Wisconsin Circuit Court was reversed by the Supreme Court of Wisconsin (the Court Below) by mandate on June 18, 1973. (R. 204, App. 25). The Court below explicitly decided that such a determination was not in violation of constitutional equal protection. (R. 201, App. 22). The cause was, therefore, remanded to the Wisconsin Circuit Court with directions to affirm the decision of the Board of Adjustment. Petitioner's motion for rehearing* was denied on September 10, 1973. (R. 205).

REASONS FOR GRANTING WRIT

The first and paramount reason why a writ of certiorari should be granted is that the decision below is in direct conflict with *Boraas v. Village of Belle Terre*, 476 F. 2d 806 (2d. Cir. 1973) U.S. *Appeal Docketed*, No. 191, 42 U.S.L.W. 3109. This Court has recently noted probable jurisdiction in *Boraas*, 42 U.S.L.W. 3226. *Boraas* and this case have similar factual contexts in that each involves: (1) a challenged classification under a "single family" zoning ordinance; and (2) small groups of unrelated persons who, although they function as single housekeeping units, are excluded by the zoning ordinance.

The Second Circuit Court of Appeals in *Boraas* ruled that it was discriminatory to exclude small household groups from a one-family zone district if based upon the ground that such groups are not traditional-family units. The Court below held that it was not discriminatory to exclude groups of emotionally disturbed children from a single family zone district when

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*The Supreme Court cited fourteen factual distinctions between Browndale and foster homes which were contrary to or wholly unsupported by the record. This was brought to the Court's attention by petitioner's brief in support of its motion for rehearing. The briefs in support of and in opposition to the motion for rehearing have been certified and are part of the record in this court.

the legislative purpose was perceived as identical to that in *Boraas*, *i.e.*, preservation of the traditional-family pattern in the district.

First, the *Boraas* Court suggested that if a suspect classification were involved, that the "strict scrutiny" standard should be applied to determine whether there had been a violation of constitutional equal protection. *Boraas* determined that the group discriminated against (students) did not render the classification "suspect" so as to invoke the stricter standard. The Court below did not consider this question even though the challenged classification discriminated against groups of emotionally disturbed children.

This Court has held from the very outset of its consideration of the matter, that local zoning ordinances, products of the exercise of delegated state police power, must satisfy the requirements of due process, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and equal protection.[9] This Court has stated that where a classification provides for differential treatment on the basis of suspect criteria that the governmental purpose must be "compelling" and classification must be "necessary" to achieve this purpose. *Shapiro v. Thompson*, 394

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[9]Petitioner assumes for the purpose of this petition that either the "new equal protection" or so-called "strict scrutiny" test should be applied because of the suspect classification involved here (emotionally disturbed children) *Loving v. Virginia*, 388 U.S. 1 (1967) or the new standard which focuses on the rationality of the means used to attain the object of the statute. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S.

U.S. 618 (1969). Yet the Court below has held that the local zoning authority may differentiate between petitioner's homes and traditional-families (including foster homes) on the basis that petitioner's homes are for emotionally disturbed children without any governmental showing that its purpose is compelling or that this classification is necessary to achieve that purpose.

The importance of this dangerous constitutional precedent to emotionally disturbed children as a class is readily apparent. It means that emotionally disturbed children may be successfully barred from living in residential areas throughout the United States. They will be relegated to institutions, ostracized from the rest of society, in undesirable commercially zoned districts. This will result merely because an illness has beset them, through no fault of their own and which in no way inhibits necessarily their ability to be a part of society.

The decision of the Court below has ramifications other than in zoning. In any instance where the state's police power is exercised, emotionally disturbed children can be freely discriminated against if there is a theoretical showing that some legitimate state purpose is being coincidentally furthered.

Second, the *Boraas* Court applied a "rationality of means" test, distilled from recent decisions of this Court, when it considered whether the challenged classification violated the Equal Protection Clause. Using this standard, it found that the

classification did not satisfy constitutional equal protection. The Court below held that the "minimal scrutiny" standard was the appropriate one to be applied and found that the challenged classification satisfied equal protection requirements.

This Court, in several recent equal protection decisions, has evidenced an intent to scrutinize the rationality of means used to effectuate the object of a statute. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). Under this approach, the test for the application of the Equal Protection Clause is whether the classification is, in fact, substantially related to the legislative purpose and is not void for other reasons such as overbreadth. The decision below singularly neglected to consider the rationality of the means to the ends in question or whether the classification used was too sweeping, excessive or overinclusive. Its failure to do so poses danger not only to emotionally disturbed children but also to others who do not constitute traditional-family groups.

The decision below means that local zoning authorities can further homogenize their communities by excluding groups similar to emotionally disturbed children in furtherance of a social predilection[10] in the form of entrenched family units. Groups of mentally retarded children could likewise be excluded. Rehabilitated drug addicts or alcoholics who choose to live together could be excluded from residential areas as "not desirable."

Because of the direct conflict with *Boraas*, where this Court has noted probable jurisdiction, and because of the

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[10] Assuming *arguendo* that such is a valid zoning objective.

important implications of the decision below for emotionally disturbed children as well as other groups insofar as it affects where they may live, it is incumbent that this Court grant certiorari to correct the manifest error of the Wisconsin Supreme Court.

I. By Determining That A Legislative Classification Discriminating Against Emotionally Disturbed Children Was Not Suspect, The Court Below Has Decided An Important Constitutional Question Contrary To Applicable Decisions Of This Court.

This Court has consistently given judicial solicitude to minorities that appeared permanently voiceless and invisible and to whom the political process paid little heed. *Loving v. Virginia*, 388 U.S. 1 (1967), [race]; *Graham v. Richardson*, 403 U.S. 365 (1971), [alienage]. Where this Court has found such a minority, it has required that the governmental purpose achieved by the discrimination is "compelling," *Graham v. Richardson*, 403 U.S., at 375; "overriding" *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); "important" *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); or substantial, and that the use of the classification is "necessary to the accomplishment" of its purpose, *McLaughlin v. Florida*, 379 U.S., at 196; *Loving v. Virginia*, 388 U.S., at 11.

The holding of the Court below conflicts in principle with the above decisions because of its failure to consider the classification by the respondent Board of Adjustment (emotionally disturbed children) as suspect. Emotionally disturbed children as a class are a prime example of a "discrete and insular" minority, *United States v. Carolene*

Products Co., 304 U.S. 144 (1938) for whom "heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S., at 372.

This Court has consistently emphasized that a governmental body which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin v. Florida*, 379 U.S., at 196, a burden which requires it to show that its purpose or interest is both constitutionally permissible and substantial, and that the classification is "necessary" to achieve that purpose.

The Court below upheld the subject classification by the respondent Board of Adjustment on the ground that the legislative purpose of the Zoning Ordinance was to maintain the traditional family pattern, *i.e.*, occupancy of single family dwellings by traditional-biological-family groups. The effect of this legislative purpose is to structure socially the community in a homogeneous basis by compelling its residents to conform to the traditional family pattern. Such a goal does not relate to the public health, safety or welfare. *Kirsch Holding Company v. Borough of Manasquan*, 59 N.J. 241, 281 A. 2d 513 (1971); *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966).

The Court below states that it cannot reasonably be said that the respondent Board of Adjustment is attempting to exclude emotionally disturbed children from the Town of Cottage Grove (R. 200, App. 20):

> The fact that the Board has already allowed one therapeutic home in this disputed district in the town of Cottage Grove evidences this. It cannot be reasonably said that the Board is attempting to thwart this method of care and treatment for emotionally disturbed children.

By reinstating the Board of Adjustment's decision, however, the Court below directed the petitioner to cease and desist operating said home in the Town of Cottage Grove without first obtaining site approval. The Ordinance provides that site approval is obtained by application to the Dane County Zoning Committee. The standards which the Dane County Zoning Committee uses in making its determination,[11] (with respect to approval of site) would allow it to exclude emotionally disturbed children on the basis that they are ". . . injurious to the use and enjoyment of other property in the immediate vicinity. . . ."[12] Unfettered by constititional limitations, the Zoning Committee could freely prohibit emotionally disturbed children from living in the Town of Cottage Grove.

Not only did the Court below erroneously determine that the discriminatory classification was legitimate, but failed to show how the purpose was at all compelling. Even if the above-stated purpose (maintenance of traditional family pattern) for the classification were constitutionally legitimate, it still could not be said that it is compelling.

Since the Court below found no legal discrimination at all in separately classifying Browndale homes on the basis of the emotionally disturbed children living there, it gave no consideration to the nature of the governmental purpose. Petitioner submits that no compelling state purpose is involved. The suggested legislative purpose is not of the paramount nature required to exclude emotionally disturbed children as a class.

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[11] Section 10.25 (4)(g), Dane County Zoning Ordinance (1971).

[12] Section 10.25 (4)(g)(2), Dane County Zoning Ordinance (1971).

II. By Refusing To Scrutinize The Means Used (Discrimination Against Emotionally Disturbed Children) To Achieve The Legislative End (Protection And Maintenance Of The Traditional Family Pattern In The Community), The Court Below Has Decided An Important Constitutional Question Contrary To Applicable Decisions Of This Court.

This Court, in several recent equal protection decisions, has evidenced an intent to scrutinize the rationality of means used to effectuate the object of a statute. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). The new standard of review has been described as one which permits:

> . . . consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. . . . If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld. If not, it denies equal protection. *Boraas v. Village of Belle Terre*, 476 F. 2d 806, 814 (2d. Cir. 1973) U.S. *Appeal Docketed*, No. 191, 42 U.S.L.W. 3109, probable jurisdiction noted, 42 U.S.L.W. 3226.

The Court below applied the "old equal protection" or "minimal scrutiny" standard in arriving at its decision.

> In *Madison Metropolitan Sewerage District v. Committee* (1951), 260 Wis. 229, 253, 50 N.W. (2d) 424, we stated that:
>
> The question of classification is primarily for the legislature, both as to need and basis . . . All that seems

> to be required is that there must be some reasonable basis along general lines for the adoption, all reasonable doubts to be resolved in favor thereof. . . . (R. 201, App. 22).

The Court below did not focus on the factual rationality of the legislative means under attack as suggested by the decisions of this Court but rather determined that the classification would be upheld if any state of facts could reasonably be conceived to justify it. The Court below conceived of fourteen factual distinctions between Browndale homes and foster homes which would permit separate legal classification. (R. 201-203, App. 22-24). These factual distinctions were contrary or wholly unsupported by the record. This was brought to the attention of the Court by petitioner's brief in support of its motion for rehearing.

Petitioner has already suggested the importance of the rights of emotionally disturbed children that are adversely affected by the classification. The Court below failed to consider the nature of these important rights or the governmental interest urged in support of the classification.

The differences suggested by the Court below to rationalize the classification of Browndale homes differently from foster homes have no relation and are contrary to the legitimate objectives of the Zoning Ordinance. The Wisconsin legislature delegated the power to enact zoning ordinances to the various county boards in Wisconsin. This enabling legislation contains an extensive list of permissible purposes for which zoning regulations may be enacted by the local authority.[13] The legislature, as evidenced by this enabling legislation, delegated to the county boards local control of land use development for the enumerated purposes of the statute.

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[13]Section 59.97, Wisconsin Statutes (1971).

The concern of the Dane County Board in limiting the permitted use in an A-1 Agricultural District to a single family dwelling unit is evident from the definition of "single family dwelling"[14] and "family"[15] in the Ordinance. The residential and rural land use of the district would be destroyed if multi-unit or overcrowding uses were permitted. This is in accord with the general purposes outlined by the legislature.

The exclusion of emotionally disturbed children from a single family dwelling zone district is not a rational way to achieve these ends. Factually, there is no question that the use of the land by petitioner is the same in all respects to that use of the land by foster homes. Because of the important rights affected by this classification, the rationality of the classification to achieve the stated ends should have been subjected to strict scrutiny by the Court below. Instead, the Court below has erroneously applied the minimal scrutiny standard in passing on the rationality of the respondent Board of Adjustment's classification.

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[14]Section 10.01 (18)(a), Dane County Ordinance (1971).

[15]Section 10.01 (19), Dane County Ordinance (1971).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the mandate of the Supreme Court of Wisconsin.

Respectfully submitted,

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